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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CAROL O'MALLEY,

Plaintiff and Appellant,

v.

RONALD D. VICK,

Defendant and Respondent.

B171385

(Los Angeles County
Super. Ct. No. BC271561)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Haley J. Fromholz, Judge. Reversed.

Nemecek & Cole, Frank W. Nemecek, David B. Owen and Susan S. Baker
for Plaintiff and Appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, Steven J. Joffe, David D.
Kremenetsky and Otis D. Wright for Defendant and Respondent.

INTRODUCTION

This appeal arises out of an unusual set of circumstances. The plaintiff purchased a life insurance policy on her mother's life, believing her mother was born in 1910. Approximately a year later, the plaintiff learned from an aunt that her mother may, in fact, have been born in 1906. The plaintiff spoke to the individual who, either as an insurance agent or broker, had assisted her in obtaining the policy. He told her that as long as she continued to pay the premiums, there would not be a problem and that after several years the policy could not be contested. In addition, he told her he would consult the insurer about the possible error in her mother's age but he never reported back to the plaintiff about any such discussions. He asked the plaintiff to try to find clear proof of her mother's age. She was unable to do so. The documents she located supported her mother's verbal claim of a 1910 birth date; meanwhile, plaintiff's aunt told her to the contrary. Significantly, the agent/broker never told the plaintiff that if it turned out her mother was born in 1906 instead of 1910, the benefits on the policy would be significantly reduced.

Ten years later, the plaintiff's mother died. When the insurer pressed her to find documentation of her mother's birth date, she obtained a "vital record" that suggested her mother had been born in 1906. The insurer accepted that document as proof of the insured's true date of birth and therefore reduced by almost \$200,000 the benefits paid on the life insurance policy.

The plaintiff thereafter sued the insurer and the agent/broker. The insurer has since settled with the plaintiff. This appeal involves the agent/broker's liability for fraud in misrepresenting the effect of the error on the policy benefits and for negligence in failing to exercise due care in advising the plaintiff on that issue. The trial court granted summary judgment on the fraud claim and sustained without leave to amend a demurrer to the cause of action for negligence.

We conclude the grant of summary judgment was error. Triable issues of material fact exist on the fraud claim. Because we reverse that ruling, we will also reverse on the negligence cause of action to permit the plaintiff to file a third amended complaint alleging negligent misrepresentation, a pleading she had tendered to the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

In December 1989, plaintiff Carol O'Malley applied for a \$750,000 life insurance policy on the life of her mother, Mayme Hanks (Hanks), born Mayme Cox. Because Hanks had assets in excess of \$2 million, plaintiff wanted the policy to pay for the estate taxes to be incurred when Hanks died. The application stated Hanks was 79 years old and had been born on April 6, 1910 in Johnson County, Texas. Both plaintiff and Hanks signed the application. The application was handled by Ronald D. Vick. Whether Vick was acting as an insurance agent or a broker is, as explained below, a controverted issue.

In January 1990, the now-defunct Executive Life Insurance Company (Executive Life) issued the policy with an annual premium of \$29,946.73. (In September 1993, Aurora National Life Insurance Company (Aurora) assumed the obligations on the policy after Executive Life was placed in rehabilitation by the State of California.)

The "General Provisions" portion of the policy contains two paragraphs potentially relevant to this dispute. The first, "Age," states: "The Insured's age is the age attained on the Policy Date. If the age . . . of the Insured has been misstated, any benefits will be those the premiums paid would have purchased at the correct age[.]" The second, "Contestability," states: "All statements made in the application shall, in the absence of fraud, be considered representations and not warranties. Statements may be used in defense of a claim or the validity of this

policy only if they are contained in the application. Except for nonpayment of premiums, this policy will not be contestable after it has been in force during the lifetime of the Insured for two years from the Date of Issue.”¹

When plaintiff applied for the life insurance policy in December 1989, her best knowledge was that her mother had been born in 1910. That was the date on her mother’s driver’s license and that was what her mother had always told her. However, a question about her mother’s date of birth arose when one of plaintiff’s two maternal aunts, Ada “Gypsy” Cox McClean, died in November 1990. Plaintiff had always believed McClean was younger than her mother. However, plaintiff saw “either at the mortuary in the book or in a funeral notice” that her aunt’s “birth date was listed as 1907.” Plaintiff asked her mother about this discrepancy; her mother “said it was a mistake.”

In January 1991, plaintiff asked her other maternal aunt: “[I]f 1907 was a correct date for my Aunt Gypsy, then when was my mother born[?]” Her aunt told her: “Honey, you’ll have to talk to your mother about it.” When plaintiff again

¹ In *New York Life Ins. Co. v. Hollender* (1951) 38 Cal.2d 73, an insured understated his age by two years on an application for life insurance. The policy contained provisions very similar to the “Age” and two-year “Contestability” provisions in the policy bought by our plaintiff. More than two years after the policy was issued, the insurer discovered the fraud. The insurer brought an action to reform the policy to reduce its face value to conform to the insured’s true age. The issue was whether its reformation action was barred by the “contestability” clause. The court held it was not. It reasoned: “[The insured’s] alleged understatement of his age was not, under the terms of the policy, ground for its rescission by [the insurer], for the policy expressly obligated [it] to pay the amount of insurance which the premiums paid would have purchased at [the insured’s] ‘correct age.’ [Citations.] A policy provision which measures the amount of recovery does not avoid the obligation of the policy. On the contrary, it gives the insured what his money bought at the correct age. The denial of liability under a policy by reason of fraud or misrepresentation in its procurement is the ‘contest’ which is governed by the incontestable clause [citations], and not the raising of the question of coverage afforded by the policy under application of the age adjustment clause.” (*Id.* at p. 78.)

raised the issue with her mother, her mother replied “it was a mistake and that [her aunt] didn’t know anything.” Her mother reiterated she had been born in 1910. Throughout her life, her mother had told plaintiff that she (Hanks) did not have a birth certificate.

In January 1991, after receiving the premium notice for the policy, plaintiff “realized that there could be a problem [because] the policy had been filled out giving 1910 as my mother’s birth date[.]” She again contacted her aunt who told her: “Honey, I think your mom was about 18 months older than your Aunt Gypsy. And your Aunt Gypsy was born in 1907, October 1907.”

Plaintiff telephoned Vick and explained the above. She felt “it was the responsible, the honest thing to do [because the 1910 birth] date could possibly be incorrect.” She was concerned because Vick had initially told her that “most insurance companies would not cover her [Hanks] if she had been older than 79.”

Vick asked her if she had any proof that her mother had been born in 1906 as claimed by plaintiff’s aunt. Plaintiff replied she did not. He told her to go to Texas (where her mother lived and had been born) to see if she could find any proof. Plaintiff asked Vick if the policy would be cancelled, the premiums changed, or if anything else could happen. He replied: “First of all, . . . as long as you keep . . . paying the premiums . . . on time, . . . I think they’re going to want to keep this policy. I don’t think there’s going to be any problem, but I’ll check on it.” He also said something to the effect that if she kept paying for two or three years, the insurer would not “do anything anyway, even if [she] hadn’t notified [him].” Vick *never* told her that the policy benefits could be reduced because of the error in her mother’s age.

On her next visit to Texas, plaintiff searched for proof of her mother’s date of birth. All of the documents she found -- plaintiff’s own birth certificate and her mother’s driver license -- gave 1910 as her mother’s year of birth. Plaintiff told

Vick what she had found. At that point, Vick “left [her] with the understanding that he was going to do what was necessary to look into it to see if there were any problems or if there would be anything that needed to be restated or changed or altered or anything. And he said, ‘I’ll take care of it, and if there’s any problem, I’ll let you know; but just keep paying the premiums.’” After April 1991, plaintiff had no further conversations with Vick about her mother’s date of birth.

Almost ten years later, Hanks died on February 17, 2001. Plaintiff supplied the information for her mother’s death certificate. Because of what her aunt had told her, plaintiff gave April 6, 1906 as her mother’s date of birth. Hanks’ death certificate therefore uses the 1906 date.

Plaintiff presented a claim on the life insurance policy. Under the heading “Date of Birth” she wrote: “April 6, 1906 (?).” Under the heading “From what record was date of birth obtained?”, she wrote: “Driver’s License says 1910[;] Sister claims birth date 1906[;] There is no birth certificate & county has no record of birth.”

The insurer (Aurora) requested further documentation of Hanks’ age. It listed 21 types of documents that could be used to establish Hanks’ date of birth. Plaintiff ultimately submitted an authenticated copy of a “Certification of Vital Record.” It states that “Baby Girl Cox” was born in Johnson County, Texas on April 6, 1906. (As noted above, Hanks’ maiden name was Cox.)

Based upon the “Baby Girl Cox” document, Aurora reduced the benefits that it paid on the policy to the amount a 83-year old insured would have obtained with the premiums actually paid. This resulted in a payment of \$557,480 instead of \$750,000. By the time of Hanks’ death, more than \$375,000 in annual premiums had been paid. More than \$900,000 was owed in estate taxes for Hanks.

On April 23, 2001, plaintiff wrote to a claims examiner (Andrew David) at Aurora. She sent a carbon copy of the letter to Vick. In the letter, plaintiff set

forth the following chronology. She explained how in late 1990 she first learned about the possible error in her mother's age. In January 1991, she notified Vick "of the possibility of my mother's birth date being other than that which was stated on her identification." He instructed her to continue to pay the premiums. In April 1991, she went to Texas. "[A]fter searching [there] to no avail for written proof of a birth date other than 1910, [her aunt] finally told [her] [Hanks] was born in 1906." Plaintiff "immediately reported the new birth date to [Vick] who informed me he would take care of it" and that she should simply continue to pay the premiums. She concluded: "I reasonably interpreted [his] statement and instruction that the change in birth date would not affect the policy. In 2001, when I made the benefit claim . . . , Mr. Vick confirmed receiving the 1991 birth date correction."

Vick, after reviewing plaintiff's April 23, 2001 letter, wrote to the Aurora claims examiner that he "agree[d] for the most part with her recollection of the chronology of events. [¶] . . . I do recall a conversation with [plaintiff], which may have been around April of 1991 as she stated, in which she informed me of the possible discrepancy of her mother's birth date. . . . [¶] *I do not have copies of any correspondence to Executive Life notifying them of a possible misstatement of age nor can I recall what specific actions on my part were taken to notify Executive Life.* I regret that I cannot provide additional information that would help validate an accurate claim for both [plaintiff] and Aurora." (Italics added.)

Plaintiff sued Aurora and Vick. She alleged causes of action against Aurora for breach of contract and breach of the implied covenant of good faith and fair dealing. Against Vick, she alleged causes of action for negligence and fraud.

The trial court sustained without leave to amend Vick's demurrer to the negligence cause of action in the first amended complaint. Subsequently, the trial

court granted summary judgment to Vick on the fraud claim, a cause of action that was then defined by the allegations in the second amended complaint.

Meanwhile, in summer of 2003, Aurora and plaintiff entered into a confidential settlement of their dispute, resulting in Aurora's dismissal from the lawsuit.

This plaintiff's appeal follows, challenging the trial court's rulings in regard to Vick.

DISCUSSION

The trial court sustained the demurrer to the negligence cause of action before it granted summary judgment on the fraud claim. We will discuss the rulings in reverse order because our reversal of the summary judgment expedites resolution of the contention in regard to the demurrer.

A. THE FRAUD CAUSE OF ACTION

The Charging Allegations

Because the complaint defines the issues for a summary judgment proceeding,² we set forth the operative provisions of the second amended complaint in regard to the fraud cause of action. Plaintiff alleged:

“33. . . . in or around 1990, VICK, while acting in the course and scope of his agency arrangement with EXECUTIVE, whose liabilities were assumed by AURORA, was advised that HANK's age was misstated on the application. *[Vick], however, willfully, intentionally and wrongfully advised [plaintiff] that, even assuming an actual misstatement was made in the application, after two-years of paying the premiums, said misstatement would not affect the Policy benefits.*

² See, e.g., *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381-382.

[He] further wrongfully and intentionally advised [plaintiff] to take no action with respect to correcting said error but rather to continuing paying the Policy premiums.

“34. . . . at all relevant times, in making the aforementioned representation, *[Vick] knew that any errors in the application could and would always be used by AURORA to deny and/or reduce the benefits owed by AURORA to [plaintiff]* and therefore knew that [his] statements, advice and instructions to [plaintiff] were false.

“35. [Vick] knowingly and intentionally made the false representations to [plaintiff] to induce her to continue paying the Policy premiums, not to obtain other insurance and/or so that [he] could continue receiving [his] commissions for selling the Policy and keeping it in force.

“36. [Plaintiff] had no reasons to know that the representations of [Vick] were false. Had [plaintiff] known in 1990 that said [his] advice and representations were false, [she] would not have continued paying the \$350,000.00 in Policy premiums and/or would have obtained other insurance for HANKS.”

In addition, the fraud cause of action incorporated the allegations found in the pleading’s General Allegations section. These included the allegation that Vick took no “action to verify the accuracy of the information that had been provided by HANKS in the application or the subsequent information regarding the possible discrepancy.”

Vick’s Summary Judgment Motion

The core of Vick’s summary judgment motion is found in his undisputed material facts numbers 21 and 22. Number 21 reads: “Defendant VICK never told Plaintiff that her Policy benefits could not be reduced if Mayme Hanks was indeed born in 1906.” Number 22 reads: “Plaintiff never discussed with Defendant VICK

what would happen with the policy benefits in light of the age discrepancy.” Vick relied upon plaintiff’s deposition testimony to support these assertions.

Plaintiff’s Opposition to Summary Judgment

Plaintiff’s opposition to Vick’s summary judgment motion relied upon her deposition testimony that described her conversations with Vick. (We set forth the specifics of that testimony earlier in our factual statement.) She also argued that Vick’s letter to the Aurora claims examiner which responded to but did not dispute the specifics of her April 23, 2001 letter constituted an adoptive admission of the contents of her letter. Lastly, consistent with the allegations in the second amended complaint, plaintiff offered evidence that Vick had a financial motive to intentionally deceive her about the potential ramifications of incorrectly stating her mother’s age. A declaration from Steven Fuld, an experienced life insurance agent, reads:

“1. I am a chartered life insurance agent who has substantial experience in all aspects of the need for, purpose and sale of various life insurance products. I have substantial experience in dealing with the duties and obligations of a life insurance agent/broker and have lectured extensively on these subjects. I hold a Chartered Life Underwriters (CLU) designation and am a Chartered Financial Consultant (ChFC) and I am a member of the external faculty of The American College.

“2. I dealt with EXECUTIVE LIFE INSURANCE COMPANY for many years and am very familiar with their insurance products including underwriting guidelines, terms of their policies and how their commissions are paid. Additionally, I sat through the deposition of RONALD VICK and listened to the testimony he gave thereat. I have further been retained as an expert witness in this case.

“3. Generally, during the early 1990s, persons selling EXECUTIVE whole life policies, such as the one sold to O’MALLEY, were paid a commission of approximately 60-80 % of

the first years' premium. Based upon my review of the premium statements that were issued by EXECUTIVE to [plaintiff], I have determined that RONALD VICK earned a 60% commission on the initial annual premium. Because the initial annual premium paid by O'MALLEY was \$29,896.73, the initial commission paid for the sale of this policy was \$17,937.00.

"4. Additionally, the commission schedules produced by VICK shows that the annual renewal commission paid on this policy was \$3,100.08.

"5. It is a basic principle that is known by all life insurance agents/brokers that an age misstatement on an application that is discovered during the first two years of the policy will result in an immediate rescission and/or cancellation of the policy. This is especially true for elderly individuals who are at or near the age of 80. As such, there is no doubt that, had VICK notified EXECUTIVE that HANKS was actually 83 and not 79 when the policy inceptioned, EXECUTIVE would have immediately rescinded and/or canceled the policy. As a licensed life insurance agent, VICK had to have known this information.

"6. Had the policy been canceled within the first two years, EXECUTIVE would have refunded to [plaintiff] all of the premiums that she had previously paid."

The Trial Court's Ruling

The trial court granted Vick's motion for summary judgment on the fraud cause of action. It ruled:

"[The] cause of action for fraud . . . is based on [Vick's] alleged misrepresentations about a policy of insurance [plaintiff] bought on the life of her mother. [Plaintiff] alleges that Vick was advised that the insured's age was misstated in the application and that he represented to [plaintiff] 'that even assuming an actual misstatement was made in the application, after two years of paying premiums, said misstatement would not affect the policy benefits.' . . . In fact, on the death of the insured, the benefits were reduced to those the premiums would have purchased had her earlier birth date been given.

“[Vick] argues that [plaintiff] cannot prove two elements of her fraud claim: misrepresentation and justifiable reliance.

“ . . .

“[Vick] establishes with Undisputed Facts Nos. 21 and 22, and the supporting evidence, that no such representation was made. [Plaintiff] fails to show that there is a triable issue of material facts as to Nos. 21 or 22. In her opposition separate statement, she only argues that [Vick] concealed such information from her, not that [Vick] made a misrepresentation. ‘The burden on the defendant moving for summary judgment only requires that he or she negate plaintiff’s theories of liability as alleged in the complaint.’ [Citation.]

“[Plaintiff] also claims that [Vick] misrepresented that the policy could not be cancelled based on a misstatement of the insured’s age. . . . This alleged misrepresentation is also not pled. Moreover, it is irrelevant, as it is undisputed that the policy was not cancelled. . . .

“[Plaintiff] also argues that [Vick] told her he would notify the insurer about the possible age misstatement, and that if he had done so, the policy would have been cancelled and the premiums refunded. [Plaintiff] further argues [Vick] knew this would be the result. However, the evidence [Fuld’s declaration] on which [plaintiff] bases these contentions is mere speculation.”

Discussion

It is, of course, well-settled that a “defendant moving for summary judgment need address only the issues raised by the complaint; the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers. [Citation.]” (*Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98-99, fn. 4.) However, in this case the trial court misapplied that principle, an error that Vick replicates in his respondent’s brief. The error is that each has too narrowly

construed the fraud allegations in plaintiff's second amended complaint, allegations we have set forth above in verbatim.

The gist of plaintiff's claim is that Vick told her that the mistake about her mother's birth would not affect receipt of the policy benefits. However, both the trial court and Vick incorrectly construed the complaint as alleging that Vick affirmatively misrepresented to plaintiff that there would be no reduction in benefits. Building on that analysis, the trial court and Vick relied upon plaintiff's deposition testimony that Vick never advised her one way or the other about a possible reduction in benefits to conclude that there was no evidence to support her fraud claim. That conclusion is incorrect because it ignores the breadth of plaintiff's allegations (Vick advised her the error would have no effect on benefits) and ignores her additional allegations (Vick advised her to take no action other than to continue to pay the premiums; Vick knew the error could reduce the policy benefits; and Vick took no follow-up action). As we now explain, plaintiff did offer evidence to support all of these allegations.

In accord with the traditional rule governing appellate review of a summary judgment proceeding that the evidence of the opponent (here, plaintiff) is to be liberally construed,³ plaintiff testified that Vick told her that as long as she continued to pay the premiums, there would not be a problem with the life insurance policy. Furthermore, in an apparent reference to the incontestability clause, Vick told her that if she paid the premiums for the next several years, the insurer would be precluded from taking any action. Vick's advice was incorrect. Notwithstanding plaintiff's diligent payment of premiums, the error about Hanks' age resulted in a substantial reduction of policy benefits. In other words, the

³ See, e.g., *Vournas v. Fidelity Nat. Tit. Ins. Co.* (1999) 73 Cal.App.4th 668, 672.

evidence *does* support plaintiff's claim that Vick falsely told her the age "misstatement would not affect the Policy benefits."

Vick also assured plaintiff that he would look into the matter and if there was a problem, he would notify her. However, no evidence was presented to the trial court that Vick ever pursued the issue with Executive Life⁴ and plaintiff testified she never heard back from Vick after their April 1991 conversation. And at no point did Vick properly inform her that the error would result in a reduction of benefits.

Lastly, Fuld's declaration was evidence that Vick knew, or should have known, that had the error been promptly reported to Executive Life, the policy would have been cancelled. In addition, Fuld's declaration offered evidence of Vick's financial motive to falsely advise plaintiff: if Executive Life cancelled the policy, Vick would have lost not only his \$17,937 commission from the initial sale but the \$3,100 annual renewal commission he would receive as long as the policy remained in force.

⁴

In a footnote in his respondent's brief, Vick cites to one page in his deposition testimony that explained what he did after speaking with plaintiff about the matter. However, this portion of his deposition testimony was not presented to the trial court. Instead, each party presented selected pages from the deposition transcript to support their respective positions.

Shortly after filing his brief, Vick lodged the entire deposition transcript with this court, requesting that it be made part of the record on appeal. We denied the request "without prejudice to showing whether this document was before the trial court and, if not, why it is cognizable here." Vick's Separate Statement of Undisputed Material Facts did not cite to this testimony and Vick has pointed to nothing to indicate the entire transcript was before the trial court when it ruled upon the summary judgment motion. We therefore decline to consider it.

Since any doubts about granting a defense motion for summary judgment must be resolved in favor of the plaintiff, we conclude that the above evidence,⁵ taken together, demonstrates there is a triable issue of material fact on plaintiff's fraud allegations.

We also find no merit to Vick's claim that there is no evidence of reasonable reliance by plaintiff on his fraudulent misrepresentations. Vick relies upon the fact that the policy states any age misstatement will result in a reduction of benefits. Plaintiff testified that while she had a copy of the policy, she never reviewed its terms. In these circumstances, whether plaintiff's reliance was reasonable is a question of fact. "Absent some notice or warning, an insured should be able to rely on an agent's representations of coverage without independently verifying the accuracy of those representations by examining the relevant policy provisions. This is particularly true in view of the understandable reluctance of an insured to commence a study of the policy terms where even the courts have recognized that few if any terms of an insurance policy can be clearly and completely understood by persons untrained in insurance law. [Citations.]" (*Clement v. Smith* (1993) 16 Cal.App.4th 39, 45 [concluding that substantial evidence supported the trial court's finding that the insured reasonably relied on an agent's misrepresentation of coverage even if the policy clearly indicated to the contrary].)

In sum, the court erred in granting summary judgment on the fraud cause of action.

⁵ The trial court summarily dismissed Fuld's declaration as "mere speculation." The record does not support that conclusion.

B. THE NEGLIGENCE CAUSE OF ACTION

The Complaint's Allegations

In regard to the negligence cause of action, the operative pleading was the first amended complaint.

It alleged, in pertinent part:

“26. . . . around 1990 that VICK, while acting as an authorized agent and in the course and scope of said agency for EXECUTIVE, whose liabilities were assumed by AURORA, was expressly advised by O’MALLEY that, while O’MALLEY believed that HANKS’ age was correctly stated on the application, said age may have been misstated. [Vick], however, negligently, wrongfully and unlawfully advised O’MALLEY to take no action with respect to correcting said possible discrepancy.

“27. [Vick] after being advised that there might be a possible discrepancy on the application, negligently, carelessly and/or wrongfully failed to take any action on [his] own behalf with respect to correcting the potential error reported to [him] in or around 1990 and further failed to take any action to protect the rights of O’MALLEY and/or HANKS.

“28. [Vick] advised her that, after the policy was in effect for a period of two years, it would not be contestable for any reason and that any possible discrepancy in the application would not affect the policy benefits. As such, [Vick] advised O’MALLEY to keep paying the Policy premiums. Based upon the express representations made by [Vick], O’MALLEY continued to pay premiums to AURORA through approximately February 2001. Said premiums have approximated \$350,000.00

“29. . . . upon the death of HANKS, AURORA has sought to reduce the benefits owed under the Policy by asserting the same unsubstantiated possible discrepancy on the application of which it was informed about in or around 1990 and which it advised O’MALLEY to take no action to correct.

“30. . . . in the event that it is determined that HANKS did misstate her age on the application, AURORA, despite the express representations of its authorized agent, will not pay all of the benefits owed under the Policy. Had O’MALLEY known in 1990 that the benefits owed under the policy would be reduced as a result of the possible discrepancy reported by her, O’MALLEY would not have continued paying the premiums charged by AURORA.

“31. As a proximate result of the negligence, carelessness, and unlawfulness of [Vick], O’MALLEY has been wrongfully deprived of her rights and benefits owed to her under the Policy and has been further damaged by virtue of her continued payment of the premiums charged by AURORA. Additionally, O’MALLEY has incurred and will incur attorneys fees and litigation expenses in order to obtain the benefits owed to her under the Policy and have otherwise been damaged in an amount that is not yet fully ascertainable, but in excess of the jurisdiction of this court. When O’MALLEY has ascertained the full amount of her damages, she will seek leave of Court to amend this Complaint accordingly.”

Vick Successfully Demurrs to the Negligence Claim

Vick demurred to the negligence cause of action.⁶ He contended that because he was acting within the course and scope of his authority as an agent of his disclosed principal Executive Life, he could not be liable as a matter of law. He relied, inter alia, upon *Lippert v. Bailey* (1966) 241 Cal.App.2d 376 (*Lippert*). In *Lippert*, an insured sued its insurance agent and the insurer for negligence based upon the defendants’ failure to provide adequate insurance as had been requested. After reviewing out-of-state authorities, the court noted that the California rule is that “[w]here the signature as agent and not as a principal appears on the face of the contract, the principal is liable and not the agent. [Citations.] . . . [¶] [T]he

⁶ Vick also demurred to the fraud cause of action. The court sustained that demurrer with leave to amend.

action against the insurance agents was improper under the circumstances because the negligent invasion of the plaintiffs' contractual right by the agents was, by virtue of their agency relationship to [the insurer], attributable to the agents' principal. A legal remedy, either *ex contractu* or *ex delicto*, could be maintained only against the principal." (*Id.* at pp. 382-384; accord: *Filippo Industries, Inc. v. Sun Ins. Co.* (1999) 74 Cal.App.4th 1429, 1442-1444.)

In October 2002, the trial court sustained Vick's demurrer to the negligence cause of action without leave to amend. It ruled: "The [negligence] Cause of Action of this case comes within the rule of *Lippert*: . . . Vick is alleged to have acted negligently as an authorized agent of the insurer and in the course and scope of his agency at the relevant times and in doing the alleged wrongful acts. . . . It is also alleged that at the relevant times, [the insurance company] was a fully disclosed principal of Vick."

Plaintiff Seeks Leave to File An Amended Complaint

In deposing Vick on the remaining fraud cause of action, plaintiff learned that when the policy had first been purchased, Vick had *not* been acting as an agent of Executive Life. Instead, he had been acting as an insurance broker. He had asked Vincent Annable, who was licensed to do business with Executive Life, to obtain proposals from various insurers.

Based upon the discovery of these facts, plaintiff's counsel prepared a proposed third amended complaint to re-allege the negligence cause of action against Vick. In a nutshell, the pleading sought to allege that because Vick was acting as broker, not an agent of Executive Life, he could be liable for his own negligence. In particular, plaintiff attacked Vick's negligent failure to advise her that an error in stating her mother's age would result in a reduction of policy

benefits and his negligent failure to follow-up with Executive Life as he had promised her he would do.

On September 19, 2003, five days before the hearing on Vick's summary judgment motion, plaintiff moved for leave to file a third amended complaint. She attached a copy of the proposed pleading to her motion. This motion was pending when the trial court granted summary judgment and entered judgment for Vick on plaintiff's complaint.

Discussion

On this appeal, the parties spill much ink in debating whether the court properly sustained without leave to amend the demurrer to the negligence cause of action. In the course of this debate, they discuss whether Vick was an agent or broker first when he helped plaintiff obtain the policy and later when she raised her concerns with him about her mother's age. In addition, plaintiff argues that the trial court improperly interpreted decisional law; she claims the rule denying liability of an agent of a disclosed principal applies only if the cause of action is for breach of contract but not if it lies in tort. Lastly, plaintiff argues that even if Vick were only an agent, he can be liable in tort because he assumed a special duty when the issue of her mother's age arose by representing to her that the policy did provide the coverage she requested (\$750,000) and that he would contact Executive Life about the age discrepancy.

There is no reason for us to decide any of these points. Because we have concluded that the trial court erred in granting summary judgment on the fraud cause of action, we believe plaintiff should be granted leave to file her third amended complaint. (See *Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 911.) As plaintiff noted when she moved for leave to file that pleading, recently

discovered evidence shed new light on Vick's status.⁷ Furthermore, there is no unfairness to Vick in permitting this amendment since the negligent misrepresentation cause of action arises from the same basic facts supporting the fraud cause of action which we have re-instituted. (See *Herrera v. Superior Court* (1984) 158 Cal.App.3d 255, 259 and Code Civ. Proc., §§ 472c, subd. (a) and 473, subd. (a)(1).)

“Where the complaint is defective, “[i]n the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend [her] complaint, and it ordinarily constitutes an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment. [Citations.]”” (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 970-971.) Here the proposed third amended complaint may cure any defect in the earlier pleading. The amendment will simply give plaintiff an opportunity to properly present her case.⁸

⁷ On that point, the proposed pleading alleged: “VICK, while acting as an independent insurance agent and/or insurance broker retained by [plaintiff] to procure insurance on HANKS for [plaintiff's] benefit was advised that HANKS' age was misstated on the application.”

⁸ Code of Civil Procedure section 472b provides that the amended pleading “shall be filed within 30 days after the clerk of the reviewing court mails notice of the issuance of the remittitur.”

DISPOSITION

The judgment is reversed and the trial court is directed to proceed in accord with the views expressed herein. Appellant is to recover her costs on appeal.

NOT TO BE PUBLISHED

HASTINGS, J.

We concur:

EPSTEIN, P.J.

GRIMES, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.